INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, APPELLANT

v.

CLARICE B. COVERT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

OPINION BELOW

The opinion of the District Court granting the writ of habeas corpus has not been reported. A copy is annexed hereto as Appendix A.

JURISDICTION

On November 22, 1955, the District Court for the District of Columbia entered an order granting the relator (appellee here) a writ of habeas corpus and ordering her discharge from the custody of the respondent (appellant here). A notice of appeal to this Court was filed in the

District Court on December 22, 1955. The jurisdiction of this Court to review on direct appeal the decision of the District Court, granting the writ of habeas corpus on the ground that the Act of Congress under which the appellee was being held for retrial by court-martial is unconstitutional, is conferred by 28 U. S. C. 1252.

STATUTE INVOLVED

50 U. S. C. 552, 64 Stat. 109, Article 2 of the Uniform Code of Military Justice, provides in pertinent part:

> § 552. PERSONS SUBJECT TO THIS CHAPTER (ARTICLE 2).
>
> The following persons are subject to this chapter:
>
> * * * * *
>
> (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands * * *.

QUESTION PRESENTED

Whether Congress has power under the Constitution to confer jurisdiction on a court-martial

to try a dependent wife of a member of the United States Air Force, residing in public quarters on the air base in England at which her husband was stationed, for the crime of murder committed by her within the confines of the air base in England.

STATEMENT

The appellee was tried by court-martial at a United States Air Force base in England for the murder of her husband, an Air Force sergeant, on or about March 10, 1953, at a United States Air Force base in England. She was convicted and sentenced to imprisonment for life. Her conviction was affirmed by the Board of Review. On review by the Court of Military Appeals of issues with respect to the evidence and instructions regarding insanity, the conviction was set aside and a rehearing directed, if practicable.

In affirming the conviction, the Board of Review found that appellee was a person accompanying the armed forces without the continental limits of the United States and within the ambit of Article 2 (11) of the Uniform Code of Military Justice, *supra*. Evidence introduced at the trial established that appellee and her children had been brought to England via military service transport at government expense on application by her husband pursuant to permission granted by the Commanding General, Third Air Force. She and her husband had been assigned to public quarters on the base. She was authorized to use the facilities of the Commissary and Post Ex-

change, and was entitled to receive, and did receive, medical treatment at the United States Air Force facilities at the base.

The Board of Review also noted that at the time of the commission of the alleged offense there was in existence the United States of America (Visiting Forces) Act, 1942 (5 and 6 Geo. VI, Ch. 31) (Appendix C, *infra*, pp. 17a–21a) effectuating an agreement between the Government of the United States of America and His Majesty's Government in the United Kingdom, which related to jurisdiction over members of the military and naval forces of the United States. In accordance with the provisions of that Act, the United States Base Commander executed an appropriate certificate which was delivered to an authorized representative of the British Government, setting forth that the accused was on March 10, 1953, a person subject to the military laws of the United States, and thereafter no action was taken in respect to the accused by British authorities.

Following her conviction by the general court-martial in England, appellee was confined in the Federal Reformatory for Women, Alderson, West Virginia. After the conviction was set aside by the Court of Military Appeals, a retrial was ordered by a court-martial convened at the Bolling Air Force Base, and appellee was transferred to Washington, D. C. There being no suitable custodial facilities for women at any military instal-

lation in the Washington area, she was confined in the District of Columbia jail on July 14, 1955.

On November 17, 1955, appellee filed, in the United States District Court for the District of Columbia, a petition for a writ of habeas corpus challenging the validity of her detention on the ground that she was not subject to court-martial jurisdiction. An order to show cause issued, and on November 22, 1955, the District Court, after hearing argument, entered an order granting the writ of habeas corpus. It ruled that under the principles of *Toth* v. *Quarles*, 350 U. S. 11, "the Court must conclude that in this case the petitioner appears to be entitled to a trial by the civil courts. The Court believes that it is required to grant the writ of habeas corpus in the present proceeding."

THE QUESTION IS SUBSTANTIAL

Article 2 (11) of the Uniform Code of Military Justice (*supra*, p. 2) confers authority upon courts-martial of the armed forces of the United States to try persons serving with, employed by, or accompanying those forces without the continental limits of the United States and certain of its territories. The general court-martial which tried appellee for the murder of her husband, committed on a United States Air Force base in England, claimed authority to do so by virtue of Article 2 (11). In granting appellee's petition for a writ of habeas corpus, the District Court

for the District of Columbia ruled that Congress had no constitutional power to authorize courts-martial to try civilians accompanying the armed forces for crimes committed without the continental limits of the United States and certain of its territories.

The question presented by this case is of prime importance in view of military and political developments, both in this country and abroad, since the end of World War II. Elements of the military and naval establishments of the United States, which must be maintained to meet the nation's commitments and to insure our national security, are now located in many friendly foreign nations. In order to preserve the morale of forces stationed outside the United States and to encourage recruitment of new personnel, the military and naval forces have permitted dependent wives and children to accompany their husbands to foreign duty stations. In addition to the more than 20,000 civilians employed by and serving with the United States armed forces overseas, there are approximately 250,000 civilian dependents living in or near military reservations outside of the continental limits of the United States. Insuring a standard of conduct on the part of such great numbers of American civilians abroad under the auspices of our military and naval forces which will be conducive to continued acceptance of their presence by the host government presents a substantial problem

for the military and naval commanders. The ruling of the District Court effectively restrains the authority of the armed forces abroad to control the activities of dependent civilians in foreign lands.

We think that the District Court failed to appreciate the essential difference between the situation presented by this case and that involved in *Toth* v. *Quarles*, 350 U. S. 11. Compare *Madsen* v. *Kinsella*, 343 U. S. 341. In the *Toth* case, the Court had before it a defendant who, at the time he was accused and held for trial by court-martial, had no connection with the military in any way. This Court held that the military could not reach out and bring him back within military jurisdiction simply because the crime had been committed when he was subject to such jurisdiction. Here, the appellee, both at the time the offense was committed and at the time she was originally held for trial by court-martial, had a direct and immediate relationship to the military, living on an American military base in a foreign country to which she had been brought by American military authorities as part of the general military program by which soldiers in our armed forces are sent overseas to fulfill our military and international commitments. She was so intimately a part of the army overseas as to be subject to military jurisdiction in terms of American military law.

Moreover, jurisdiction of appellee may be sustained on a further ground. The question in this aspect is not where to draw the line between United States military and civilian jurisdiction. The basic question is the line between American and foreign jurisdiction. Had there been no act of Congress, and no action by the executive in this matter, appellee would have been triable, not in an American civil court, but in the court of the foreign country where she happened to be. Congress has seen fit to provide that those civilians who are sent overseas, in a broad sense as part of the American military contingent, shall, because of their close connection with American military forces, be subject to trial under American law. As we show below, this decision by Congress was implemented by action in the foreign relations field. In this view, the questions are whether Congress has the power to provide that American civilians thus sent abroad as part of the program of American military commitments in foreign areas shall be triable under American law, and then whether, having that power, Congress may implement its decision through use of the existing system of courts-martial as the instrument for enforcement. The power of Congress to enact Article 2 (11) thus rests not only upon its authority under Article I, Section 8, clause 14 of the Constitution "To make Rules for the Government and Regulation of the land and naval Forces," but also upon its com-

plete power to enact legislation to aid the President in the field of international relations, both of which powers are supplemented by the "Necessary and Proper" clause.

1. Congress validly provided—under Article I, Section 8, clause 14, and the "Necessary and Proper" clause—for the trial by court-martial of persons like the appellee accompanying and living with members of the armed forces overseas. Appellee was living on an American military base in quarters furnished by the military. She was overseas because her husband, a member of the military forces, was sent abroad in fulfillment of American military commitments and because the American military authorities had determined that it furthered the morale of the armed forces to permit their families to accompany them. Cf. *Madsen* v. *Kinsella*, 343 U. S. 341, 345, 361. In the eyes of this country, and of the foreign nations in which our armed forces are stationed, the civilians described in Article 2 (11), are part of the American military contingent. Their actions directly affect the discipline, the status, and the reputation of our armed forces overseas. It is therefore fitting and proper that they be subject to discipline under American military law.

The concept of subjecting to military jurisdiction civilians accompanying armies is not new. The Articles of War of King James II of England, promulgated in 1688, contemplated the trial

and punishment of civilians by courts-martial when it provided:[1]

ART. XLV

> No Officer or Soldier shall be a Victualler in the Army upon pain of being punished at discretion.

ART. XLVI

> No Victualler or seller of Beer, Ale, or Wine belonging to the Army, shall Entertain any Soldier in his House, Booth, Tent, or Hutt after the Warning-Piece, Tattoe, or Beat of the Drum at night, or before the Beating of the Reveilles in the morning; Nor shall any Soldier within that time be any where but upon his Duty, or in his Quarters, upon pain of Punishment both to the Soldier and Entertainer at the Discretion of a Court-Martial.

In the British Articles of War of 1765, which served as a model for the early American Articles, there appeared Article XXIII of Section XIV, which provided:[2]

> All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though not inlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War.

---

[1] Winthrop, *Military Law and Precedents*, 2d ed., Reprint 1920, p. 926.

[2] Winthrop, p. 941.

The first Articles of War of the United States, enacted by the Continental Congress on June 30, 1775, provided:[5]

> XXXII. All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army.

A similar provision was contained in the 1776 Articles of War[6] which remained in effect, with irrelevant changes, until almost two decades after the adoption of the Constitution. Against this background, the constitutional provision for the government and regulation of the armed forces must be read as necessarily sanctioning the trial by court-martial of certain classes of civilians intimately related to the armed forces. Cf. *Dynes* v. *Hoover*, 20 How. 65, 79. It is equally significant that every successive reenactment of the Articles of War by the Congress of the United States, including the Uniform Code of Military Justice of 1950, has contained an article making civilians serving with the army subject to military law.

The word "accompanying" which now appears in Article 2 (10) and (11) of the Uniform Code of Military Justice was first introduced into military law during the general revision of the

[5] Winthrop, p. 956.

[6] Winthrop, p. 967 (Art. 23).

Articles of War in 1916. Major General Enoch H. Crowder, then The Judge Advocate General, who had urged this revision, after explaining to the House Committee on Military Affairs that it was intended thereby to include camp followers and persons serving with or accompanying the Army in the field, said:[5]

> There is nothing new in the article in subjecting these several classes to the provisions of article 65. It is a jurisdiction which has always been exercised. When any person joins an army in the field and subjects himself by that act to the discipline of the camp he acquires the capacity to imperil the safety of the command to the same degree as a man under the obligation of an enlistment contract or of a commission.

Following the failure of the revision in the 62d and 63d Congresses, General Crowder appeared before the Senate Committee on Military Affairs in the 64th Congress and testified:[6]

> In the present condition of our Articles of War "retainers to the camp" (i. e., officers' servants, newspaper correspondents, telegraph operators, etc.) and "persons serving with the armies in the field" (i. e., civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons, officials, and employees of the provost marshal gen-

[5] Hearings before the House Committee on Military Affairs, 62d Cong., 2d Sess., on H. R. 23628, p. 61.

[6] S. Rep. No. 130, 64th Cong., 1st Sess., pp. 37-38.

eral's department, officers and men employed on transports, etc.) are made subject to the Articles of War only during the period and pendency of war and while in the theater of military operations. A number of persons who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included. They constitute a class whose subjection to the Articles of War is quite as necessary as in the case of the two classes expressly mentioned. Accordingly the article has been expanded to include also persons accompanying the Army. The existing articles are further defective in that they do not permit the disciplining of these three classes of camp followers in time of peace in places to which the civil jurisdiction of the United States does not extend and where it is contrary to international policy to subject such persons to the local jurisdiction, or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances—as, for example, where our forces accompanied by such camp followers are permitted peaceful transit through Canadian, Mexican, or other foreign territory, or where such forces so accompanied are engaged in the nonhostile occupation of foreign territory, as was the case during the intervention of 1906–7 in Cuba.

Congress adopted the changes suggested by General Crowder by enacting Article 2 (d) of the Articles of War of 1916. See *Madsen* v. *Kinsella*, 343 U. S. 341, at 361.

The power of Congress under Article I, Section 8, to subject to court-martial jurisdiction civilians who accompany the military forces of the United States overseas has been repeatedly upheld on the theory that such civilians bear so direct a relationship to military organization and discipline as properly to be subject to military punishment. See *Ex parte Gerlach*, 247 Fed. 616 (S. D. N. Y.); *Perlstein* v. *United States*, 151 F. 2d 167 (C. A. 3), certiorari granted, 327 U. S. 777, certiorari dismissed, 328 U. S. 822; *United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904; *Rubenstein* v. *Wilson*, 212 F. 2d 631 (C. A. D. C.); *In re Berue*, 54 F. Supp. 252 (S. D. Ohio); *Grewe* v. *France*, 75 F. Supp. 433 (E. D. Wis.). A wife brought overseas by the military as part of the general military program has, as we have shown (*supra*, pp. 6–7), the same direct relationship to military management. In the very recent opinion in *United States ex rel. Krueger* v. *Kinsella* (reprinted as Appendix B, *infra*, pp. 4a–16a), which involved a dependent wife who was tried by a general court-martial in Japan for the murder of her officer husband, the District Court for the Southern District of West Virginia so held, sustaining Article 2 (11) of the Uniform Code of

Military Justice. See also *Madsen* v. *Kinsella*, 343 U. S. 341, 345, 361, discussed *infra*, pp. 18–19.

The court-martial jurisdiction having constitutionally attached to appellee in England as a person accompanying the armed forces of the United States outside the continental limits, it was not lost by virtue of her return to the United States in Air Force custody under the court-martial sentence, or by virtue of the remand of her conviction by the Court of Military Appeals for further proceedings. *Walker* v. *Morris*, 3 Am. Jurist 281 (Mass.); *In re Bird*, 3 Fed. Cas. 425 (D. Ore.); *Barrett* v. *Hopkins*, 7 Fed. 312 (C. C. D. Kans.); *United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904; *Perlstein* v. *United States*, 151 F. 2d 167 (C. A. 3), certiorari granted, 327 U. S. 777, certiorari dismissed, 328 U. S. 822; *Carter* v. *McClaughry*, 183 U. S. 365. The decision of this Court in *Toth* v. *Quarles*, 350 U. S. 11, is entirely consistent with the proposition that the mere act of returning to the continental United States, after court-martial jurisdiction has attached and been exercised, does not destroy such jurisdiction.

2. The authority of Congress to enact Article 2 (11) of the Uniform Code of Military Justice may also be sustained as an exercise of the power to make all laws necessary and proper for carrying into execution the sovereign power of the United States to maintain relations with

other sovereignties.[7] *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304. It is a recognized principle of international law that the jurisdiction of a nation *within its own territory* is generally absolute. *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 134. As a corollary to this principle, there has developed the rule that the character of an act (relating to private parties) as lawful or unlawful is normally determined by the law of the country where the act is done. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. Accordingly, the country in which a civilian accompanying American forces commits the crime of homicide might well insist on trying him in its own tribunals according to its own law. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356; *Phillips* v. *Eyre*, L. R. 4 Q. B. (1869) 225, 239; L. R. 6 Q. B. (1870) 1, 28; see Schwartz, *International Law and the NATO Status of Forces Agreement*, (1953) 53 Col. L. Rev. 1091, 1104–1111. The foreign nation may, however, by international agreement, express or implied, or pursuant to accepted rules of international law, consent to the exercise of jurisdiction over American nationals by duly constituted United States authorities for acts done within the territory of the foreign nation. *Dainese* v. *Hale*, 91 U. S. 13; *In re Ross*, 140 U. S. 453; *United*

[7] Another pertinent source of power is that of Congress to implement the President's powers as Commander-in-Chief of our armed forces.

States v. Curtiss-Wright Corp., 299 U. S. 304, 318.

Article 2 (11) contemplates just such an arrangement for trial under American law, rather than foreign law, of Americans within the classes specified who are charged with offenses overseas. The article subjects "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" and certain territories to trial by court-martial for acts done in foreign nations. That it was the purpose of Congress in enacting this provision to conform with established principles of the law of nations is evidenced by the introductory phrase that such court-martial jurisdiction will be "[s]ubject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law."

In the instant case, appellee, an American citizen who allegedly murdered her husband in England, was left by representatives of Her Majesty's government to the jurisdiction of the United States Air Force in England. The surrender of the right to exercise jurisdiction over appellee by the English and the exercise of such jurisdiction by the American authorities were properly accomplished pursuant to the agreement entered into by both countries and incorporated in the United States of America (Visiting Forces) Act, 1942 (5 and 6 Geo. VI, Ch. 31),

Appendix C, *infra*, pp. 21a–27a. Under the terms of this international agreement, the courts-martial of the United States armed forces stationed in England were the instrumentalities by which the agreement was to be executed.

For the exercise of such extraterritorial jurisdiction over persons otherwise subject to foreign law, Congress was not required to provide a system including indictment and trial by jury; nor was it required to make the federal district courts the forum. This is clear from the decision in *In re Ross*, 140 U. S. 453, upholding against contentions like the present appellee's a conviction by a consular court for a murder by an American seaman in a Japanese port. See also, *Dorr* v. *United States*, 195 U. S. 138; *Ex parte Bakelite Corp.*, 279 U. S. 438. Further and more recent support derives from *Madsen* v. *Kinsella*, 343 U. S. 341, which closely resembles this case in its essential facts. There, as here, a dependent wife was charged with the murder of her husband, a member of the armed services with whom she was living in Germany. By executive action under the law of war, the wife was tried by a tribunal in the nature of a military commission enforcing *German* law. And this Court explicitly recognized that she could have been tried by court-martial under the earlier counterpart of what is now Article 2 (11). See 343 U. S. at 345, 361. While Germany was occupied territory whereas England is a friendly receiving power, the im-

portant points of similarity go far to show that in this case, as there, the power existed (in *Madsen* by conquest, here by agreement) to try by American court-martial what would otherwise be a case triable by the foreign state. Cf. *Neely* v. *Henkel*, 180 U. S. 109, 122.

It is clear, in other words, that the provision in Article 2 (11) for trial by court-martial of persons "accompanying the armed forces" overseas should be read in its context of international law, not merely in the purely American terms which would be involved in the case of a wife accompanying her husband *within the United States*. Thus viewed, the relevance of cases like *In re Ross*, *Neely* v. *Henkel*, and *Madsen* v. *Kinsella* becomes plain, demonstrating that in this area of foreign trials the employment of non-Article III tribunals is a valid procedure which does not deprive the American defendant of any constitutional protections to which he is entitled.

Accordingly, we do not believe that the right to use courts-martial as the means of implementing the extraterritorial jurisdiction consented to by England needs to be defended only in terms of Article I, section 8, clause 14 of the Constitution, though we believe that clause would provide a sufficient basis. The question in this aspect is whether it is reasonable for Congress to apply American law to crimes committed overseas by Americans like Mrs. Covert, by using its established system of courts-martial rather than by

setting up some other forum for trial, such as, for example, the former consular courts. Cf. *Madsen* v. *Kinsella*, 343 U. S. 341. Considering the many rights which safeguard a trial by court-martial (see *Burns* v. *Wilson*, 346 U. S. 137, 142–143), it is clear that the use of the court-martial system as the method of trying such Americans overseas is a reasonable exercise of congressional power which accords the accused a full measure of due process.

CONCLUSION

It is respectfully submitted that the decision below is erroneous, that the question presented is substantial, and that the Court should take jurisdiction of this appeal.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD J. BLANCHARD,
Attorneys.

FEBRUARY 1956.